REMARKS

(A) Status of the Application

(I) Disposition of Claims

(i) Claims 1-5 are pending in the application.
(ii) Claims 1-5 are rejected.

(II) Applicant's Action

(i) Applicant has amended Claims 1-5.
(ii) Applicant responds to the 35 U.S.C. § 102(b) rejection.
(iii) Applicant responds to the 35 U.S.C. § 112 and other objections.

(B) References and Abbreviations Discussed In This Paper

In the list below, references are listed on the left side and their abbreviation used in the text on the right side:

Present Patent Application— U.S. Pat. App. Serial No. 10/566,537	the 26090-049 or the 049 application invention
February 26, 2010 Final Office Action— Current Office Action	Office Action
U.S. Patent No.6,105,802 to French, *et al.*	French
U.S. Patent No. 6,279,779 to Laciacera, *et al.*	Laciacera

(C) Finality of the Office Action

Applicants respectfully contend that this is not a proper FINAL office action for two reasons. According to MPEP § 706.07(a) "[u]nder present practice, second or any subsequent actions on the merits shall be final, except where the examiner introduces a new ground of rejection that is neither necessitated by Applicant's amendment of the claims nor based on information submitted in an information disclosure statement filed during the period set forth in 37 CFR 1.97(c) with the fee set forth in 37 CFR § 1.17(p)."

In the "FINAL" Office Action, the Examiner rejected the present invention under 35 U.S.C. § 102(b) as anticipated by the French and the Laciacera references. However, the new grounds of rejection were not based on the amendments made by the applicant in the last office action response. In the last office action response, the claim limitations introduced related to the pre-cap and the full-cap position provided by the present invention. On the other hand, neither French, nor Laciacera relates to such positions. Certainly both references relate generally to a cap and a spout type of a system—but that

is all. Applicant believes that because the two references are so different from what the present invention proposes, Applicant's opportunity to present his case should not be foreclosed. Had Applicant known that these references would be cited against the present set of claims, Applicant would have squarely addressed the differences as he has done in this paper.

As such, Applicant believes that with the current response the 049 Application stands a high likelihood of allowability, and therefore, requests the Examiner to reconsider the finality of the rejection and a withdrawal of the finality of the rejection. If the finality of the rejection is not taken back, Applicant will be in an inopportune situation wherein an RCE will have to be filed simply to put forth Applicant's response to the rejection based on the two references that he has not had a previous opportunity to address, at all.

(D) Antecedent Basis & the Locking Ring—Specification and Claim 5

Applicant amends Claim 5 to accurately reflect that the locking ring (41) is present on the spout and not on the cap as was inadvertently indicated in amendment to Claim 5. Please see Paragraph [0031] on Page 3 of the 049 published application for support basis.[1]

In addition, Applicant has also further amended Claim 5 to address the confusion between the locking ring on the spout and the ring lock or shoulder on the cap. Particularly, the phrase "locking ring" in the second qualifying clause of Claim 5 is amended to "locking ring on the spout," thereby making it more specific as to its location. Furthermore, the Specification has been amended to remove confusion between "locking ring" on the spout and the "ring lock" on the cap. "Ring lock" on the cap now referred to as "shoulder" in the Specification (See Page 2).

(E) Drawings Related Issue—Pre-Cap and Full-Cap Positions

According to the Examiner, the pre-cap position and the full-cap position of the TEF assembly are not shown in the drawings. We respectfully disagree. The pre-cap position is shown in Figs. 2A and 2B. The full-cap position is shown in Figs. 4A and 4B.

(F) Drawings Related Issue—Reference Character "32"

Reference character32 is used to show "lower internal ledge" (See Page 3, Paragraph [0029]) in Figs. 1B, 1C, and 3, but not in Fig. 2B. A Replacement Sheet Fig 2B, with the corrected drawing is attached.

(G) Claim Objections

Claim 1 is amended by replacing "~~tamper frangible indicating band~~" to "frangible tamper indicating band."

[1] See the 049 Patent Application Publication No. 2007/0181578A1, Page 3, Paragraph [0031].

(H) 112, First Paragraph Issues—Claim 5

According to the Examiner, Claim 5 fails to satisfy the written description and enablement requirements of 35 U.S.C. § 112, First Paragraph.

It appears that both these issues arise because of a claim amendment in the previous response, wherein, inadvertently, Applicant stated that the cap includes the locking ring. Clearly, this is incorrect and is simply a typographical error. We have amended Claim 5 to accurately reflect that the spout includes the locking ring (See Section (C) above).

(I) Other Antecedent Basis Issues

Claims 1 and 2 recite the limitation "the flange." But there is insufficient antecedent basis for this limitation in the claim. In response, Applicant has replaced the term "the flange" with the term "the annular flange," for which there is sufficient antecedent basis.

In Claim 2, several terms already introduced in Claim 1 were re-introduced. Applicant has amended claim 2 to address this problem.

(J) 112, Second Paragraph Issues—Claim 5

According to the Examiner, Claim 5 suffers from indefiniteness under 35 U.S.C. § 112, 2nd Paragraph. From the Examiner's comments, it seems that the alleged indefiniteness was a result of the typographical error during a previous amendment as a result of which, Claim 5 suggested that the locking ring was part of the cap. This issue has been addressed previously (See Sections (C) and (G), *supra*), and in light of the correcting amendment to Claim 5, the indefiniteness issue is now moot.

(K) Anticipation Rejection by the French Reference under 35 U.S.C. § 102(b)—Claims 1-5

In the Office Action, the Examiner alleges that French anticipates Claims 1-5 of the 049 application under 35 U.S.C. § 102(b). We respectfully disagree with the Examiner's conclusion because the tamper-evident fitment assembly (TEF assembly) of the 049 patent shows many distinguishing features over the closure/container system disclosed in French. The differences are discussed below.

In the 049 application, the cap can be affixed on the spout without the cap being in a full-cap position, but still providing an aseptic seal. This refers to the pre-cap position (or the pre-fill position; see for example, Fig. 2B). In this position, the annular locking ring is below the cap's tamper indicating band. Clearly, the shoulder or the tamper-evident ring lock has not engaged the locking ring of the spout. Yet, the cap provides an aseptic seal. This feature is very useful to avoid contamination or spoiling of the spout before filling the container or bag to which the TEF assembly will attach.

On the other hand, the French system does not have a structure that can afford both a pre-cap and a full-cap position for the closure on the container. The pre-cap position related feature is described neither in the specification nor in the drawings. Even if one argued that such a position was possible, that is, the skirt member (36) being above the intermediate outwardly extending ridge or skirt portion (20), the cap cork (the cylindrically-shaped internal centering element (46)) would end up being in a position of non-attachment (no seal) to the container because it would be positioned in such a way that a gap will be created between the locking lip (18) and the upper end wall (32).

In the 049 TEF assembly, the cap is attached by a push-on mechanism and removed by a pull-off mechanism. On the other hand, in the closure/container system of French, while the closure can be pushed onto the container, it is removed only by twisting the cap away via a screw action. For example, according to French, ". . .the closure is provided with a tamper-evident skirt readily separated from the closure by twisting the closure in an opening operation with respect to the container." In fact, in the 049 TEFA system, the external screw threads (40) at the top of the spout are generally provided for attachment to a connector pipe (for example, for emptying the container), and not for attaching the cap. Similarly, the TEF assembly cap does not have internal threads for closing or opening the cap by twisting and turning in a screw action, but instead has ridges that may be used for locking. Threads, a person skilled in the art knows, are continuous, as opposed to annular rings.. In contrast, (see Fig. 2), the French system clearly shows threads both on the inside of the closure and the outside container specifically for engaging the closure on to the container.

The 049 TEF assembly is different in one more way in one of its embodiments. Its spout comprises circular tab protrusions (39), that "cooperates with locking ring (41) to engage and retain tamper-evident ring lock (38)" when the cap is peeled away from the spout subsequent to a full-cap, post-fill position.[2] When the cap is pulled off (peeled away) from the spout, the tamper indicating frangible elements break. But because the frangible elements are sufficiently plastic, they may have a tendency to elongate, avoiding a tear. As a result, even when the cap is completely removed, the band may remain attached to cap instead of being retained on the spout. In such situation, the user would not know whether the cap has been tampered with, or not attached on to the spout in first place. But on the other hand, if the band were retained on the spout, it is a clear indication that the cap was tampered or removed. In contrast, no such tabs exist in the French system.

Therefore, French does not anticipate the 049 invention under 35 U.S.C. § 102 (b).

(L) Anticipation Rejection by the Laciacera Reference under 35 U.S.C. § 102(b)—Claims 1-5

In the Office Action, the Examiner further alleges that Laciacera also anticipates Claims 1-5 of the 049 application under 35 U.S.C. § 102(b). We respectfully disagree with the

[2] *See* the 049 Patent Application Publication No. 2007/0181578A1, Page 3, Paragraph [0031].

Examiner's conclusion because the tamper-evident fitment assembly (TEF assembly) of the 049 patent shows many distinguishing features over the cap/frame/cutting member (CFC) assembly disclosed in Laciacera. The differences are discussed below.

In the 049 application, the cap can be affixed on the spout without the cap being in a full-cap position, but still providing an aseptic seal. This refers to the pre-cap position (or the pre-fill position; see for example, Fig. 2B). In this position, the annular locking ring is below the cap's tamper indicating band. Clearly, the shoulder or the tamper-evident ring lock has not engaged the locking ring of the spout. Yet, the cap provides an aseptic seal. This feature is very useful to avoid contamination or spoiling of the spout before filling the container or bag to which the TEF assembly will attach.

On the other hand, the Laciacera system does not have a structure that can afford both a pre-cap and a full-cap position for the closure on the container. The pre-cap position related feature is described neither in the specification nor in the drawings. For example, Laciacera states that "[c]ap 17 is fitted initially to frame 15 in a sealed position, wherein the cap is screwed completely onto collar 20, with the end edge 38 of the cap and tamperproof ring 37 still connected to each other and resting on opposite sides of rib 28 of collar 20."[3] (Emphasis added).

In the 049 TEF assembly, the cap is attached by a push-on mechanism and removed by a pull-off mechanism. On the other hand, in Laciacera's CFC assembly, the cap is affixed onto the frame and removed off it by screw and unscrewing action. Laciacera does not suggest using a push-on/pull-off mechanism for attaching the cap to the frame. Clearly, the cap has internal threads and the frame has corresponding external threads, seen clearly in Fig. 4 of Laciacera.

The 049 TEF assembly is different in one more way in one of its embodiments. Its spout comprises circular tab protrusions (39), that "cooperates with locking ring (41) to engage and retain tamper-evident ring lock (38)" when the cap is peeled away from the spout subsequent to a full-cap, post-fill position.[4] When the cap is pulled off (peeled away) from the spout, the tamper indicating frangible elements break. But because the frangible elements are sufficiently plastic, they may have a tendency to elongate, avoiding a tear. As a result, even when the cap is completely removed, the band may remain attached to cap instead of being retained with the spout. In such situation, the user would not know whether the cap has been tampered with, or not attached on to the spout in first place. But on the other hand, if the band were retained on the spout, it is a clear indication that the cap was tampered or removed. In contrast, no such tabs exist in the Laciacera system.

Therefore, Laciacera does not anticipate the 049 invention under 35 U.S.C. § 102 (b).

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3 *See* Laciacera generally.

4 *See* 049 Patent Application Publication No. 2007/0181578A1, Page 3, Paragraph [0031].

CONCLUSION

In view of the above remarks, we have properly traversed the 35 U.S.C. §§ 102(b) & 112 rejections and other objections, and have completely responded to the February 26, 2010 Final Office Action.

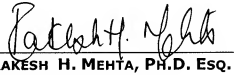
The application is therefore allowable. We respectfully solicit that the PTO withdraw the rejections and allow the claims.

A petition to extend the filing of this response by two months under 37 C.F.R. § 1.136(a) accompany this response.

Please contact the undersigned (Applicant's attorney) for questions and charge any un-accounted for fees to Deposit Account No. 501447 (Potter Anderson & Corroon, LLP).

RESPECTFULLY SUBMITTED,

DATE: JULY 26, 2010

BY: 

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